

**MBf Capital Bhd & Anor v
Tommy Thomas & Anor (No 4)**

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-23-52 OF 1996
KAMALANATHAN RATNAM JC
12 DECEMBER 1997

*Civil Procedure — Particulars — Application for further and better particulars —
Whether necessary to file affidavit in support — Whether court should allow application*

The first defendant applied by way of summons for further and better particulars in respect of the statement of claim and the amended reply to the defence of the first defendant. It was argued for the first defendant that to prepare for trial he ought to know the particulars of the action. It was further submitted that in practice, when applying for further and better particulars, it is unnecessary to support the application with an affidavit. On the other hand, the plaintiffs argued that what the first defendant was seeking was evidence as he wanted to know how the plaintiffs were going to prove their case, and therefore, should be disallowed.

Held, allowing the application in part:

- (1) To demand particulars without giving the other party the right to assess the demand and challenge it if necessary is giving an unfettered right to a party to seek particulars by merely stating that he requires the particulars; and he alone is the best judge to decide whether he requires the said particulars or not. Such request could easily be construed as a fishing expedition to ferret out the evidence of the opposite party (see p 224A-B); *Welch v Jackson et al* [1948] OWN 708 followed.

In spite of his assertion that there was no need to file an affidavit in support of the application for further and better particulars, the first defendant had indeed, in support of this application through his solicitor affirmed an affidavit. This prevaricating conduct of the first defendant did not lend weight to assert the genuineness of his request. Further, the affidavit totally lacked fundamentals. No details were given in support. All that was said was that the particulars were necessary for the proper presentation of the first defendant's case in this action (see p 224F-G).

- (2) The first defendant by filing a voluminous and substantial defence had sufficiently understood the full effect of the statement of claim and had sufficient particulars to effectively oppose the issues. Further, by entering a plea of justification, the first defendant had traversed the claim by entering factual particulars in support of this plea, and could not have done so unless fully appraised of all particulars including those he was presently seeking (see p 225A-B).

A [Bahasa Malaysia summary]

Defendan pertama telah memohon melalui saman untuk butir lanjut dan jelas berhubung dengan pernyataan tuntutan dan jawapan terpinda pembelaan defendan pertama. Adalah dihujahkan bagi pihak defendan pertama bahawa untuk membuat persediaan bagi perbicaraan dia seharusnya tahu butir-butir tindakan. Ia seterusnya dihujahkan bahawa sebagai amalan, semasa memohon untuk butir lanjut dan jelas, adalah tidak perlu menyokong permohonan dengan satu affidavit. Sebaliknya, plaintif-plaintif menghujahkan bahawa apa yang dipohon oleh defendan pertama adalah keterangan kerana ia ingin tahu bagaimanakah plaintif-plaintif akan membuktikan kes mereka, dan dengan itu, tidak harus dibenarkan.

Diputuskan, membenarkan sebahagian permohonan:

- (1) Untuk menuntut butir-butir tanpa memberikan hak kepada pihak yang satu lagi untuk menilai tuntutan dan mencabarnya sekiranya perlu, adalah memberikan hak bebas kepada suatu pihak untuk butir-butir dengan cuma menyatakan bahawa ia menghendaki butir-butir itu; dan ia sendiri adalah hakim terbaik untuk memutuskan sama ada ia menghendaki butir-butir tersebut atau tidak. Permintaan sedemikian dengan mudahnya boleh ditafsirkan sebagai ekspedisi memancing bagi mencungkil keterangan pihak bertentangan (lihat ms 224A–B); *Welch v Jackson et al* [1948] OWN 708 diikuti.

Walaupun terdapat penegasan beliau bahawa tiada keperluan untuk memfailkan satu affidavit menyokong permohonan untuk butir lanjut dan jelas, defendan pertama pada hakikatnya telah mengesahkan satu affidavit menerusi peguamcaranya sebagai menyokong permohonan ini. Sikap defendan pertama yang berdalih tidak menyokong keikhlasan permintaannya. Selanjutnya, affidavit langsung kekurangan asas. Tiada butiran telah diberikan sebagai sokongan. Apa yang dikatakan bahawa butir-butir adalah perlu untuk pengemukaan wajar kes defendan pertama dalam tindakan ini (lihat ms 224F–G).

- (2) Defendan pertama dengan memfailkan pembelaan yang tebal dan substansial telah memahami secukupnya kesan penuh pernyataan tuntutan dan mempunyai butir-butir yang memadai bagi menentang isu-isu secara berkesan. Seterusnya, dengan memasukkan hujah justifikasi, defendan pertama telah menyangkal tuntutan dengan memasukkan butir-butir bagi menyokong hujah ini, dan seharusnya tidak dapat berbuat demikian melainkan mengetahui semua butir sepenuhnya termasuk yang kini dimintanya (lihat ms 225A–B).]

Notes

For cases on further and better particulars, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3216–3227.

Cases referred to

MBf Capital Bhd & Anor v Tommy Thomas & Anor [1997] 3 MLJ 395 (refd)

Tan Hoe Kok & Anor v Ali Akarbara Mangudin & Ors [1997] 1 CLJ 3 (refd)

Welch v Jackson et al [1948] OWN 708 (folld)

Legislation referred to

Rules of the High Court 1980 O 78 r 3(3)

Darryl Goon (Raja Darryl & Loh) for the applicant/first defendant.

VK Lingam (V Sivaparanjothi and R Thayalan with him) (V Siva & Partners) for the respondents/plaintiffs.

Cecil Abraham (RS Nathan and Rajasingam with him) (Shearn Delamore & Co) for the second defendant.

Yew Lee Ann (N Navaratnam & Co) for *K Anantham*, a partner of the second defendant.

Cur Adv Vult

Kamalanathan Ratnam JC:*The application*

This is the first defendant's application by way of summons (encl 59) for further and better particulars and my fourth judgment on this case. The particulars sought are in respect of the statement of claim and the amended reply to the defence of the first defendant.

The background facts leading to this application have already been stated in my written judgment given in respect of a similar application made by the second defendant and which judgment is the third in the series of judgments arising out of this case.

The further and better particulars requested of the statement of claim

Under para 9

- 1 Of: '... authorized ...':

State whether the alleged authorization was oral or in writing; if oral, state the date, time and place thereof, to whom the authorization was given and the words alleged to have constituted the authorization; if in writing, state every document in which it is alleged that the authorization was embodied.

- 2 Of: '... intended ...':

State every overt act of the first defendant and all other acts and state every document relied upon to show that the first defendant had the alleged intention.

- A** 3 Of: '... knew ...':
State every specific fact, document, overt act and other act relied upon to show that the first defendant had the alleged knowledge.
- 4 Of: '... natural and probable consequence ...':
- B** State every specific fact, document, overt act and other act relied upon to show the natural and probable consequence alleged.
- 5 Of: '... a leading magazine about commercial litigation ...':
State every fact relied upon as to how and why the magazine is alleged to be a leading magazine about commercial litigation.
- C** 6 Of: '... an extensive and influential distribution within the jurisdiction of this honourable court':
- (a) State the extent of the distribution, the number of copies of the magazine distributed in West Malaysia for the past three years preceding the November 1995 issue of the magazine, the number of copies of the November 1995 issue of the magazine actually distributed in West Malaysia, the persons to whom they were distributed; if distributed to magazine vendors, state the name and address of each magazine vendor, the number of copies distributed to each of them and the number of copies actually sold by such magazine vendors.
- D**
- (b) State every specific fact relied upon to show that the magazine is influential as alleged and how and in what manner the magazine is influential.
- E**

Under para 13

- F** 7 Of: '... the plaintiffs' trading reputations have been seriously damaged ...':
State the nature of the first plaintiff's trade or business at all material times and the place or places where it is carried out.

Under para 14(3)

- G** 8 Of: '... the defendants knew that the allegations complained of herein were false ...':
- (a) State every specific fact, document, overt act and other act relied upon to show that the first defendant had the knowledge alleged.
- (b) state every specific fact as to why or how the alleged allegations complained of were false.
- H**

Under para 14(4)

- 9 Of: '... knowledge and intention ...':
- I** (a) State every specific fact, document, overt act and other act relied upon to show that the first defendant had the alleged knowledge.
- (b) State every overt act of the first defendant and all other acts and all documents relied upon to show that the first defendant had the alleged intention.

Under para 14(5)(a)

A

10 Of: '... in the knowledge that the nature of their wholesale attack on their successful rivals, namely Dato' VK Lingam and his firm, VK Lingam & Co, would or was likely to result in serious damage to those rivals, to their rivals' relationships with their clients and to those clients themselves;':

B

(a) State every specific fact, document, overt act and other act relied upon to show that the first defendant had the alleged knowledge.

(b) State the nature of the serious damage to the plaintiff and to the plaintiff's clients, naming specifically the plaintiff's clients.

C

(c) State the actual damage suffered by the plaintiff (if any) and the extent of such damage.

(d) State the actual damage suffered by the plaintiff's clients (if any) stating the identity of such clients.

Under para 14(7)

D

11 Of: '... having calculated that they stood to gain more, ...':

State the nature and basis of the alleged calculation and state specifically in what form or manner and to what extent the defendants stood to gain more.

E

12 Of: '... the serious and possible fatal damage that they might thereby cause to Dato' VK Lingam and his firm VK Lingam & Co ...':

State the nature, form and extent of the alleged serious and fatal damage.

F

The further and better particulars requested of the amended reply to the defence of the first defendant

Under para 5.1

G

13 Of: '... the first defendant was actuated by bad faith and/or malice ...':

State every fact, overt act and other act relied on to support the bad faith and/or malice alleged.

Under para 7

H

14 Of: '... the first defendant was actuated by bad faith and/or malice ...':

State every fact, overt act and other act relied on to support the bad faith and/or malice alleged.

Case for the applicant

I

The applicant says that the libel is published in a magazine authorized by a third party, the writer being one David Samuels. Therefore, ex facie it

A was argued that the first defendant had not libelled the plaintiffs as he had not authored the said article. However, the first defendant conceded, and rightly so, that in law, in certain circumstances, a person may be held liable if he had authorized or intended the publication of what he had said.

B It was pointed out that the statement of claim had alleged that it was the writer who had spoken to the first defendant and in para 4.1 of the statement of claim it was pleaded that certain questions were raised and discussed. It was thus argued that the conversation could not be treated as a press interview where it is possible to assume the natural and probable consequence that such a discussion would be published. In the present case, therefore it was argued that in order for the first defendant to prepare C for trial he ought to know the particulars of the alleged authorization, intention or knowledge. As authority for this proposition, Mr Goon referred me to *Defamation Law, Procedure & Practice* by David Price (1997 Ed) at p 27 where the learned author says:

D ... In order to pin responsibility on A for the repetition, the courts have required some authorization express or implied in relation to the repetition (*McWhirter v Manning* (1954) *The Times*, 29 October; *Ward v Weeks* (1830) 7 Bing 211; *Lyons (J) & Co v Prescott-Decie* (1925) *The Times*, 16 July; *Slipper v BBC* [1991] 1 QB 283). The conduct of the speaker must be held to amount to a request to publish. Where a person gives an interview or sends a document directly to a journalist or journalists, it will E usually amount to a request for publication.

Since the first defendant has maintained that the circulation of the magazine containing the impugned article was limited to five or six copies, the first defendant sought the particulars in items 5 and 6 under para 9. Relying on a passage from *Gatley on Libel and Slander* (8th Ed) para 1325 which states:

F At the trial of an action for defamation, the plaintiff may show the mode and extent of the publication with a view to the amount of damages. (Cf per Park J in *Vines v Serrell* (1835) 7 C & P at p 163. And see *Herald v McGregor* (1929) 41 CLR at p 263.) For example, he may show that the libel was published in a newspaper when the 'defendant was under no duty to publish it except to a limited number of persons'. (G *De Crespigny v Wellesley* (1829) 5 Bing at p 402). If the libel is published in a newspaper, the plaintiff may give in evidence the extent of the circulation (*Cathercole v Miall* (1846) 15 M & W 319; *McLean v David Syme* (1970) 92 WN (NSW) 611). 'Surely the proprietor of a newspaper, with a very large circulation, is to be visited with larger damages for a libel published in it than one of a more limited circulation (per Parke B in *Cathercole v Miall* (1846) 15 M & W at p 324). H So evidence that copies of the paper containing the libel have been industriously circulated in the neighbourhood in which the plaintiff resides is admissible to show the extent of the circulation of the paper and the consequent injury to the plaintiff.

I the first defendant sought the particulars as he wanted to know whether he was facing a case of extensive circulation as this was germane to the question of damages.

With regard to para 13 and the particulars sought under item 7, the first defendant submitted that he was only seeking particulars of the first

plaintiff. Mr Goon argued that for a corporation to be able to allege or file a claim in defamation, it has to maintain that its trading reputation as such has been defamed. I accept this proposition of the law for in cases of defamation, it is certain, that a corporation's only identity to the world at large, is its trading reputation. Mr Goon again in my view rightly pointed out that there has been inadequate particulars relating to the first plaintiff's trading reputation.

It was submitted that in *MBf Capital Bhd & Anor v Tommy Thomas & Anor* [1997] 3 MLJ 395 (incidentally the first judgment in this case), I had said that a plaintiff was entitled to assess his own value. It was also further proposed that if one quantifies his claim then it becomes special damages, thus allowing the defendant to seek particulars of the special damages.

With regard to the particulars sought under para 5.1 of the amended reply to the defence, the first defendant argued that the particulars given were not particulars relating to bad faith and malice. I was referred to O 78 r 3(3) of the Rules of the High Court 1980 ('the RHC') which specifically provided that where express malice was being relied upon, the plaintiff must give particulars of facts from which the malice could be inferred.

With regard to allegations of delay in seeking the particulars, it was the first defendant's response that further and better particulars and all interlocutory matters for the purpose of setting down the matter for trial ought to be taken at the summons for directions stage.

Case for the respondents

On the first issue of delay, Dato' VK Lingam for the plaintiffs pointed out that the said application for particulars was filed after a lapse of 12 months. With regard to the particulars sought, it was submitted that the first defendant has all the requisite knowledge. Referring to para 3.1 of the defence, it was pointed out to me that the first defendant had admitted speaking on several occasions to the said David Samuels, the writer of the article in question. Dato' Lingam contended that when a defendant pleads justification to an averment in the statement of claim, he is in effect saying that the facts are true and that at the trial he would prove the truth of those allegations which the plaintiff has laid out in the statement of claim. It was urged upon me to hold that a party could not rely on justification unless he has knowledge of facts and instructions to justify that plea.

The plaintiffs argued that what the first defendant was seeking was evidence as he wanted to know how the plaintiffs were going to prove their case. Referring to the quote from *Gatley on Libel and Slander*, Dato' Lingam argued that it was only at the trial that the plaintiff had to show the mode and extent of the publication. It was further pointed out to me that no case authority had been furnished by the first defendant to support the suggestion that evidence of circulation must be furnished to the defendant before trial.

On the question of providing the particulars relating to the first plaintiff's business or trade, Dato' Lingam quite correctly undertook to provide the same. The plaintiffs submitted that the law presumes that they have a good reputation.

A With regard to the first defendant's contention that by quantifying the claim, the same has now taken the label of special damages, Dato' Lingam argued that the plaintiffs had in fact pleaded general damages and not special damages and that submission on this issue was in fact dismissed by me in the earlier decision which is under appeal by the defendants.

B With regard to the view I held in the earlier case that if the plaintiffs plead their worth, the defendants have a right to ask for details of that worth, Dato' Lingam submitted that if the first defendant was prepared to adopt the view he is taking before me, in the appeal against my earlier decision, allowing for a plaintiff to quantify his worth, then under such assurance, the plaintiffs would be prepared to furnish details of their worth. In response to the contention that insufficient particulars had been provided to illustrate express malice, the plaintiffs contended that paras 5.1 and 12 of their reply to the defence contained all the necessary particulars of express malice.

D *Court's findings*

Should reasons be given when particulars requested

Mr Goon submitted that in practice, when applying for further and better particulars it is unnecessary to support the said application with an affidavit.

E I had in *Tan Hoe Kock & Anor v Ali Akarbara Mangudin & Ors* [1997] 1 CLJ 348 said at p 358:

... that a party seeking particulars should do so pursuant to O 18 r 12(1). He should of course make a request for the particulars sought by way of a letter first and if the said request is complied with, there would then be no need for any application to be made to this court. The opposite party must then furnish the said particulars by way of Form 35 of the RHC. However, if the opposite party refused to respond to the request for further particulars made pursuant to a letter, then the party seeking particulars must file an application pursuant to O 18 r 12(3) with a supporting affidavit giving reasons for seeking such particulars. I take the stand that a party seeking particulars ought not to seek such particulars by way of O 25 r 7 unless by consent or that the particulars sought are so obvious as to be uncontestable. Order 25 r 7(1) reads:

F 'Any party to whom the summons for directions is addressed must so far as practicable apply at the hearing of the summons for any order or directions which he may desire as to any matter capable of being dealt with on an interlocutory application in the action and must, not less than seven days before the hearing of the summons, serve on the other parties a notice in Form 47 specifying those orders and directions insofar as they differ from the orders and directions asked for by the summons.'

G I draw to mind the words of Slade LJ in *Leal v Dunlop Bio-Processes International Ltd* [1989] WLR 874 wherein the learned judge said at p 885:

I '... If he cannot properly enter through the front door of O 6 r 8, he should not be allowed to enter through the back door of O 2 r 1.'

If the party seeking the particulars does not affirm an affidavit stating why he needs the particulars, there is no way in which a court is able to judge

for itself if the attempt to seek the particulars is genuine or whether in fact the applicant has no knowledge of the particulars sought. If bound under oath, a party has to aver to the truth of the situation. Otherwise, it can easily be construed that the request could be a fishing expedition to ferret out the evidence of the opposite party. To demand particulars without giving the other party the right to assess the demand and challenge it if necessary, is giving an unfettered right to a party to seek particulars by merely stating that he requires the particulars; and he alone remaining the best judge to decide whether he requires the said particulars or not. In *Welch v Jackson et al* [1948] OWN 708, Senior Master Covenant said at p 708:

The plaintiff has not deposed that the allegations as to which he asks for particulars are not within his knowledge. It is well-settled law that upon an application for particulars for the purpose of pleading, the party applying must establish not only that the particulars are necessary to plead, but that the particulars he asks for are not within his knowledge, unless the allegations are so general that particulars are manifestly necessary: *Patterson v Proprietary Mines Ltd et al* [1945] OWN 237 at pp 238–239, or are so bald as to be recognized as a pleading of which particulars should be given without a supporting affidavit: *Madden v Madden* [1947] OWN 746 at p 747 (varied in other respects [1947] OR 866). The fact that the plaintiff does not depose that the allegations are not within his knowledge disposes of the application

This decision was upheld on appeal by McFarland J at pp 710–711.

Like in the case before me, firstly in spite of his assertion that there is no need to file an affidavit in support of the application for further and better particulars, the first defendant has indeed, in support of this encl 59, through his solicitor, one Ng Sai Ying, affirmed an affidavit (encl 58). This prevaricating conduct of the first defendant does not lend weight to assert to the genuineness of his request. Further, the affidavit totally lacks fundamentals. No details are given in support. All that is said is that:

They are necessary for the proper presentation of the first defendant's case in this action. These particulars will inter alia clarify the case that the first defendant will have to meet at the trial of the action herein.

As I said in *Ali Akarbara*:

... Particulars ought not to be given in every case as of right. It is a discretionary right vested with the court to be exercised upon a study of the pleadings and the averments in the affidavit in support of the application for particulars.

The particulars sought under para 9

I find that the particulars sought by the first defendant under para 9 of the statement of claim are well within his own knowledge. The first defendant had in his defence admitted speaking to David Samuels, the writer of the article, on several occasions. He has also admitted in his defence that the said David Samuels was a writer of the said magazine and that he was writing an article about the Malaysian judiciary and that he had therefore

A sought background information from the first defendant. The first defendant had also pleaded that the said magazine had a very limited publication and distribution in Malaysia. It is my judgment that the first defendant by filing a voluminous and substantial defence had sufficiently understood the full effect of the statement of claim and had sufficient particulars to effectively oppose the issues. Further, by entering a plea of justification, B the first defendant has traversed the claim by entering factual particulars in support of this plea, and to my mind he could not have done that unless appraised fully of all particulars including those he is presently seeking save and except for the details of the trading reputation of the first plaintiff.

C Following the decision in *Welch's* case and since the first defendant has not deposed in his affidavit that these matters, the particulars of which he is seeking, are not within his knowledge, and thus depriving the plaintiffs of the right to credibly challenge the first defendant's statement of his lack of knowledge, it is my considered judgment that the application for the particulars must be denied.

D With regard to the particulars sought under para 13, as I had indicated from the outset that the request ought to be complied with and in the light of the concession by the first plaintiff to agree to grant the particulars, I make an order that the plaintiff do provide the first defendant with the particulars requested under para 13.

E The particulars sought under paras 14(3)(4), (5)(a) and (7) are denied. It is my finding that these particulars are matters of evidence and it is unjust for the plaintiffs to answer these particulars at this stage of the proceedings before the actual trial.

F I am of the view that this application is nothing more than a piscatorial venture on the part of the first defendant. Before entering into this futile expedition into uncharted waters, the first defendant must have known that his hook, line and sinker would fall into waters where the fish will just not bite.

G Save for para 13, all other particulars sought are denied. I am therefore of the view and in the exercise of my discretion, that this is a proper case where costs should be costs in the cause.

Order accordingly.

Reported by Eugene Lee

H

I